

PROGRESSIVE INSURANCE SDN BHD

a

v.

GAYA UNDERWRITING SERVICES SDN BHD

COURT OF APPEAL, KUALA LUMPUR

NH CHAN JCA

b

MAHADEV SHANKAR JCA

AHMAD FAIRUZ JCA

[CIVIL APPEAL NO: W-04-73-1995]

12 MAY 1997

ADMINISTRATIVE LAW: *Judicial proceedings - Arbitration - Test of bias - Whether allegation of bias must be supported by facts - Whether there was basis for alleging that arbitrator was bias*

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The respondent, a *del credere* agent of the appellant, had owed the appellant money, due from the insurance policies that were written by the respondent in the name of the appellant. It was agreed by the parties to have the dispute resolved before an arbitrator. There were several postponements of the hearing at the request of the respondent, but on the agreed day of the hearing the respondent did not attend. When the arbitrator decided in favour of the appellant, the respondent appealed to the court to set aside the award on the ground that the arbitrator had a personal interest in the subject matter of the suit, being the executive director of Mega First Corp Bhd ('Mega'). 9.12% of Mega was owned by the Sabah Economic Development Corp ('SEDCO') which was the investment arm of the state government and the government owned 80% of the appellant. The respondent alleged that on the facts the arbitrator was disqualified from acting. The judge in the lower court allowed the application of the respondent to set aside the award. The appellant appealed. The issue before the instant court was whether the arbitrator was biased when he made the award in favour of the appellant; and whether the judge in the lower court was right in setting aside the award.

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Held:

Per Mahadev Shankar JCA

- [1] To disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest in the subject matter of the proceedings, a real likelihood of bias must be shown not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries.

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- a* [2] It is a serious thing to allege bias against an arbitrator. In the present case before the court, had the facts been properly understood, it would have been apparent that the objection was devoid of merit.
- b* [2a] The SEDCO did not control Mega as its shareholding was only 9.12%. It was an independent corporation and had no shares in the appellant. The appellant had no shares in Mega, which also did not have any shares in the appellant. From any point of view, Mega did not have any pecuniary interest in any award that the arbitrator could make in favour of the appellant.
- c* [2b] The subject matter of the dispute was a claim for moneys due from the respondent to the appellant for insurance policies written by the respondent in the name of the appellant. The premiums were due on all the appellant's policies issued regardless of whether the respondent had been paid by the policy holders. The quantum was based on the auditors' reports and there was no suggestion of any bias on their part.
- d*
- e* [3] It was significant that having acknowledged the arbitrator's integrity, the respondent made no effort to show precisely in what way the relationship of the entities involved could result in the appellant's favour. The respondent's pretexts were intended to create a sinister impression which was not supported by the facts.

Obiter dicta

- f* [1] The failure of the respondent to raise the point, that the arbitrator could be disqualified, on the ground of the substantial ownership of the appellant and SEDCO by the state government, at the time of the confirmation of the hearing date, precluded the respondent from raising it at all.
- g* [2] The entities involved were all public companies open to the world. The manner in which the respondent conducted itself in the proceedings and then raised the point of disqualification of the arbitrator after failing to turn up for the hearing, were points which in themselves concluded the matter against it.

h [Appeal allowed; order of the lower court set aside; arbitrator's award restored.]

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[Bahasa Malaysia Translation of Headnotes]

Responden yang merupakan ejen *del credere* perayu telah terhutang wang kepada perayu yang kena dibayar hasil daripada polisi insurans yang telah ditulis oleh responden atas nama perayu. Adalah dipersetujui oleh pihak-pihak tersebut bahawa pertikaian ini diselesaikan di hadapan seorang penimbang tara. Perbicaraan-perbicaraannya telah beberapa kali ditangguhkan atas permintaan responden, tetapi pada hari perbicaraan yang telah dipersetujui itu, responden tidak hadir. Apabila penimbangtara membuat keputusan yang memihak kepada perayu, responden telah merayu kepada mahkamah untuk mengeneipkan award atas alasan bahawa penimbangtara tersebut mempunyai kepentingan sendiri dalam perkara yang menjadi hal perkara guaman, sebagai pengarah eksekutif Mega First Corp Bhd ('Mega'). 9.12% dari saham Mega dipegang oleh Sabah Economic Development Corp ('SEDCO') yang merupakan bahagian pelaburan kerajaan negeri dan kerajaan memiliki 80% dari perayu. Responden mendakwa bahawa menurut fakta-fakta, penimbangtara tidak layak bertindak. Hakim dalam mahkamah rendah telah membenarkan permohonan responden untuk mengeneipkan award tersebut. Perayu telah merayu. Isu yang harus diputuskan oleh mahkamah semasa adalah samada penimbangtara tersebut berat sebelah ketika membuat award yang memihak kepada perayu; dan samada hakim dalam mahkamah rendah itu betul ketika mengeneipkan award itu.

Diputuskan:

Mahadev Shankar HMR

- [1] Untuk tidak melayakkan seseorang daripada bertindak dalam kedudukan kehakiman atau kuasi-kehakiman atas alasan kepentingan, dalam hal-perkara prosiding, kemungkinan sebenar berat sebelah seharusnya ditunjukkan bukan sahaja daripada bahan-bahan dalam bentuk fakta yang dipastikan oleh pihak yang mengadu, tetapi daripada fakta-fakta selanjutnya sepertimana yang beliau mungkin telah sediakala pastikan dan dengan mudahnya menentusahkan dalam perjalanan siasatannya.
- [2] Mendakwa berlakunya perbuatan berat sebelah terhadap seorang penimbangtara merupakan sesuatu yang serius. Dalam kes di hadapan mahkamah, sekiranya fakta-faktanya telah difahamkan dengan betul, ianya nyata bahawa bantahan tersebut tidak bermerit.
- [2a] SEDCO tidak menguasai Mega kerana pemegangan sahamnya adalah hanya 9.12%. Ianya merupakan sebuah perbadanan bebas dan tidak mempunyai apa-apa saham dalam perayu. Perayu tidak mempunyai apa-apa saham dalam Mega, yang juga tidak mempunyai sebarang saham dalam perayu. Daripada mana-mana sudut pandangan, Mega tidak mempunyai apa-apa kepentingan kewangan dalam mana-mana award yang boleh dibuat oleh penimbangtara yang memihak kepada perayu.

- a* [2b] Hal-perkara pertikaian ialah tuntutan wang yang kena dibayar oleh responden kepada perayu untuk polisi-polisi insuran yang telah dikeluarkan oleh responden atas nama perayu. Premium-premium kena dibayar ke atas kesemua polisi-polisi perayu yang telah dikeluarkan tanpa menghiraukan samada responden telah dibayar oleh pemegang-pemegang polisi. Kuantum tersebut adalah berlandaskan laporan auditor dan tidak berbangkit apa-apa saranan mengenai sebarang sifat berat sebelah di pihak mereka.
- b*
- [3] Ianya jelas bahawa setelah mengakui keutuhan penimbangtara, responden tidak berusaha untuk menunjukkan dengan tepatnya bagaimanakah perkaitan entiti-entiti yang terlibat itu boleh memihak kepada perayu. Alasan responden bertujuan untuk mewujudkan tanggapan yang tidak baik yang mana telah tidak disokong oleh fakta-fakta.
- c*

Obiter dicta

- d* [1] Kegagalan responden untuk membangkitkan perkara bahawa timbangtara tersebut boleh dijadikan tidak layak, atas alasan pemilikan secara substansial akan perayu dan SEDCO oleh kerajaan negeri, pada waktu pengesahan tarikh perbicaraan, telah menghalang responden daripada membangkitkannya sama sekali.
- e* [2] Entiti-entiti yang terlibat kesemuanya merupakan syarikat-syarikat awam yang terbuka kepada dunia. Cara dalam mana responden telah mengendalikan dirinya dalam prosiding tersebut dan kemudiannya membangkitkan perkara ketidak-layakan penimbangtara selepas gagal untuk hadir di perbicaraan, merupakan perkara-perkara yang sendiri menentang responden.
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[Rayuan dibenarkan; perintah mahkamah rendah diketepikan; award penimbangtara dikembalikan semula.]

Cases referred to:

- g* *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors* [1995] 2 CLJ 900 (*refd*)
R v. Camborne Justices, ex p Pearce [1955] 1 QB 41 (*refd*)
R v. Rand [1866] LR 1 QB 230 (*refd*)

Legislation referred to:

- h* Arbitration Act 1952, s. 24
Companies Act 1965, s. 128

[Appeal from High Court Malaya, Kuala Lumpur; Originating Motion No: R2-25-58-1994]

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For the appellant - Renu Zechariah (S Ravichandran with her); M/s Anad & Noraini **a**
For the respondent - Ranjit Singh; M/s Cheang & Ariff

JUDGMENT

Mahadev Shankar JCA:

The appellant ('Progressive') and the respondent ('Gaya') were parties to an arbitration award handed down by the arbitrator Mr. M. Sivalingam on 17 April 1994. Thereafter Gaya successfully obtained an order under s. 24 of the Arbitration Act from the High Court setting aside the award on the ground that the arbitrator was guilty of misconduct. We allowed the appeal, set aside the High Court order and restored the award. Our reasons now follow. **b**

Gaya had been appointed the underwriting agents of Progressive by an agency agreement dated 1 July 1980. By a letter dated 1 October 1984 Progressive terminated this agency agreement. On that date Progressive claimed that RM2,193,897.35 was due to them from Gaya for the Kota Kinabalu branch alone. Subsequently the parties entered into a second agency agreement under which Gaya was required to furnish a bank guarantee for RM300,000 and Gaya's Directors were also required to furnish a joint and several guarantee in favour of Progressive. This second agency agreement contained an arbitration clause. **c**

On 2 November 1985 Progressive terminated the second agreement, and called in the bank guarantee. By 31 July 1988 Progressive computed the total amount due from Gaya to be RM2,604,190.08. **d**

At the time Mr. M. Sivalingam was an advocate and solicitor in M/s. Kean Chye and Sivalingam. Both parties agreed that he be the arbitrator. The statement of claim was filed on 11 August 1988. Gaya was represented by M/s. P.G. Lim & Co. who filed a defence and counterclaim shortly thereafter. To this Progressive's solicitors filed a reply on 31 October 1988. The pleadings were thus closed. **e**

In March 1989 Mr. Sivalingam withdrew as arbitrator on grounds of personal illness and suggested that another arbitrator be nominated. When a substitute could not be found, the parties agreed in March 1990 that Mr. Sivalingam's offer to continue be accepted. Dates for hearing were fixed in November 1991. On Gaya's application the matter was adjourned to February 1992. In January 1992 both parties agreed to the appointment of Arthur Andersen to audit the accounts and produce a report. After this Gaya went back on its agreement to Arthur Andersen and Coopers & Lybrand was jointly appointed. Because of disagreement as to their fees each party then appointed their own auditors. **f**

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- a* At Gaya's request the arbitration was postponed to January 1994 and then to March 1994, when the case was again adjourned to 19 April 1994 because Gaya's solicitors discharged themselves. The arbitrator finally heard the matter on 19 April 1984, and gave his award the same day.
- b* At all material times, Gaya's managing director was Lawrence Sinsua ('Sinsua'). On 1 June 1994 he affirmed an affidavit in support of his application to set aside the award. In it he affirmed that even prior to the hearing fixed on 21 March 1994 he was already aware that Mr. Sivalingam was working in a company called Mega First Corporation Bhd ('Mega'). This fact was known to Sinsua at the very least from the 29 October 1993. This
- c* was the date of a letter from Mr. Sivalingam to the solicitors of both parties to confirm that the hearing dates had been changed to 17-21 January 1994. This letter is on Mr. Sivalingam's letterhead c/o Mega. On some date thereafter which Sinsua has seen fit not to disclose he says he was looking through a magazine whilst waiting to see the Chief Minister of Sabah. He came across
- d* an article on Mega. He was curious to find out what the article had to say because he knew Mr. Sivalingam was working in Mega. He then discovered that the Sabah Economic Development Corporation (SEDCO) was a major shareholder of Mega, and upon inquiring further he discovered that Mr. Sivalingam was an executive director of Mega, that SEDCO owned 17,787,480
- e* shares of Mega, and that Progressive is approximately 80% owned by the Sabah State Government. Sinsua's allegation is that Mr. Sivalingam therefore had a personal interest in the subject matter of the suit which disqualified him from acting.
- f* But notwithstanding this alleged sentiment, he took no timeous action on the matter. He knew that the hearing was fixed for 23 March 1994. All that happened on that day was that Sinsua did not turn up at the hearing. Nor did his solicitors M/s. P.G. Lim & Co. who informed the arbitrator that they had received no instructions from Gaya who were aware of the hearing. Progressive's lawyers and witnesses had turned up but the arbitrator decided
- g* to postpone the hearing to 19 to 24 April 1994 to give Gaya a final opportunity to present themselves failing which he would proceed by default.
- This decision was confirmed in the arbitrator's letter to Gaya dated 23 March 1994. (See Appeal Record p. 157/158). Sinsua replied. He pre-dated his reply
- h* 4 March 1994. In it he stated his objection to Mr. Sivalingam, stating that he did not doubt Mr. Sivalingam's integrity but that the possibility of apparent bias made it undersirable for Mr. Sivalingam to act.
- Mr. Sivalingam faxed and wrote back on 11 April 1994 that he was in no way accountable to SEDCO, and that there was no question of discharge. In
- i* the arbitrator's words what then happened was this:

10. Mr. Lawrence made an oral application that I should be removed on the grounds stated in his letter dated 4 March 1994. I explained to him that (a) Mega First Corporation Berhad in which I was an Executive Director had no interest whatsoever in Sabah Economic Development Corporation and (b) I was not even aware that Sabah State Government owned the claimant company. Mr. Lawrence submitted that even though he had no doubt about my integrity still I should be removed. **a**

Mr. Anad counsel for the claimants objected and gave his grounds. He also referred me to the case of *Bremer v. Soles* [1985] 2 Lloyd's Law Reports p. 199.

I dismissed the application. **b**

11. Mr. Lawrence after that first oral application made a second application for me to postpone the matter as he wanted to apply to the High Court to remove me. Mr. Anad objected to the application. This application was considered and dismissed. **c**

12. Mr. Lawrence then made a third application for postponement and his grounds were as follows: **d**

(1) He would like to engage another lawyer.

(2) He is having discussions to try and settle the matter.

(3) There has been a change of government in Sabah and all the agencies are being audited and this exercise will include the claimants. **e**

Mr. Anad object to the application and stated:

(1) Respondents have had ample opportunity to engage another lawyer. **f**

(2) No settlement talks were in progress and the respondents have had about eight years since the dispute first arose to settle the matter.

(3) Change of government in Sabah is irrelevant.

This request for postponement was also dismissed and Mr. Lawrence left the hearing saying that he did not want to participate further in the proceedings. **g**

In the court below the learned judge thought that the Sabah Government's substantial ownership of Progressive and SEDCO, was sufficient to disqualify the arbitrator in view of SEDCO's holding in Mega. Indeed Encik Ranjit Singh conceded that this is the only ground that he could rely upon. **h**

For ourselves we should have thought that the failure of Gaya to raise this point in October 1993 precluded Gaya from raising it at all. Being public companies all the entities involved are open to the world. The manner in which **i**

a Gaya conducted itself in these proceedings and raised this point after failing to turn up for the hearing fixed for the 23 March 1994 are points which in themselves conclude the matter against them.

b However it is a serious thing to allege bias against an arbitrator. If the facts had been properly understood it should have been apparent that the objection was devoid of merit.

Mega at the material time had a paid-up capital of RM194 million. SEDCO's shareholding was just about 9.12%. In other words SEDCO did not control Mega.

c SEDCO was an independent corporation. It had no shares whatsoever in Progressive. And as for Progressive it had no shares in Mega, nor did Mega have any shares in Progressive. From any point of view Mega did not have any pecuniary interest whatsoever in any award that the arbitrator could make in favour of Progressive.

d The subject matter of the dispute is also not irrelevant. This was a claim for moneys due from Gaya to Progressive for insurance policies written by Gaya in the name of Progressive. Gaya were *del credere* agents ie, it was obliged to account for and pay to Progressive the premiums due on all Progressive policies issued regardless of whether Gaya had been paid by the policy holders.

e The quantum turned on the auditors' reports. There is no suggestion of any bias on their part.

Indeed Mr. Sinsua has not condescended on any particulars as to how it could be suggested that the arbitrator may be thought to be biased. He has said on oath that he does not doubt Mr. Sivalingam's integrity. Nor does Mr. Sinsua's counsel suggest otherwise.

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What the submission amounts to therefore is that from the primary facts that the Sabah State Government owns 80% of Progressive, and SEDCO owns 9.2% of Mega, apparent bias on the part of the arbitrator must be inferred because SEDCO is the investment arm of the Sabah State Government.

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This is such an obvious *non-sequitur* that it is somewhat surprising that it was not rejected out of hand in the court below. It is significant that having acknowledged Mr. Sivalingam's integrity he made no effort whatsoever to show precisely in what way the relationship of the four entities involved could result in the arbitrator being obliquely influenced to decide in Progressive's favour. Mr. Sinsua's counsel speculated that SEDCO could have held the gun to Mr. Sivalingam's head by applying to remove Mr. Sivalingam as a Director of Mega under the powers conferred by s. 128 of the Companies Act 1965 if

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he did not decide in favour of Progressive. This is so far fetched that it is underserving of any comment. Nor was such a submission made in the court below. a

In *Hock Hua Bank (Sabah) Bhd. v. Yong Liuk Thin & Ors.* [1995] 2 MLJ 213 this court dealt in some depth with the test for a real likelihood of bias. We only need repeat a passage from *R v. Camborne Justices, ex parte Pearce* [1955] 1 QB 41 at p. 51, and 52 (also at [1954] 2 All ER 850 at p. 855) where Slade J formulated the test prescribed by Blackburn J in *R v. Rand* [1866] LR 1 QB 230, at p. 232 thus: b

... that, to disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceedings, a real likelihood of bias must be shown **not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries.** c

and continued: d

The frequency with which allegations of bias have come before the Courts in recent times seems to indicate that Lord Hewart's reminder in *R v. Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at p. 259, that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" is being urged as a warrant for quashing convictions, or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias. Whilst indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than it should in fact be done. e

Mr. Sinsua's pretexts were intended to create a sinister impression which the facts do not support. We therefore allowed the appeal, set aside the order of the court below, gave the appellant his costs before us and in the court below; and ordered a refund of the deposit. The arbitrator's award still stands. f

Reported by Anne Soh

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